WALTER WRIGHT (SINGAPORE) PTE. LTD.

v.

DIRECTOR-GENERAL OF INLAND REVENUE

HIGH COURT MALAYA, JOHOR BAHRU
LC VOHRAH J
[CIVIL NO. PKR 432]
22 MARCH 1990

REVENUE LAW: *Income Tax Act 1967 - Double Taxation Agreement between the Government of Malaysia and Singapore (DTA) - Meaning of income - Application of overlapping principles - When to utilise DTA.*

The appellant was incorporated and is resident in Singapore with no permanent establishment in Malaysia. It carries on business of hiring cranes and trucks for profit. For the 2 years ending 30 June 1976 and 1977, it received income from the letting of cranes on hire to Walter Wright (M) Sdn. Bhd. for use in Malaysia and it was assessed to income tax by the Singapore Government.

The respondent on its part also raised the assessment in respect of the said income having regard to s. 4(d) of the Malaysian Income Tax Act 1967 (ITA) and Article VIII of Double Taxation Agreement (DTA) which provides that royalties (including payment of any kind received as consideration *inter alia* for the use of, or the right to use industrial, commercial or scientific equipment) derived from sources within Malaysia by the appellant may be taxed in Malaysia i.e., the contracting state from which the royalties are derived. Royalties are income upon which tax is chargeable under the ITA (s. 4(d)).

The Special Commissioners of Income Tax confirmed the assessment raised by the respondent. Hence this appeal. Question for determination is whether relief is available to the appellant having regard to s. 4(a) of ITA and Article IV of the DTA. Section 4(a) refer gains or profits from a business as income upon which tax is chargeable and Article IV states that the income or profits of a Singapore enterprise shall not be taxable in Malaysia unless the enterprise carries on business in Malaysia through a permanent establishment situated in Malaysia.

Held:

[1] Relying on the overlapping principles propounded by *American Leaf Blending Co. Sdn. Bhd. v. Director-General of Inland Revenue*, it is clear that rental income, despite the fact that it is referred to specifically is s. 4(d) of the ITA may nevertheless constitute income from a source consisting of a business if it is receivable in the course of carrying on a business of putting the taxpayer's property to profitable use by letting it out for rent. In view of the fact that the business of appellant consisted of hiring out cranes and trucks in Malaysia, there is no doubt that under the Malaysian ITA, the rental income of the appellant is business income and not only rental income.

[2] It must be borne in mind that the nature of the income and the law which charges it tax have to be determined by the ITA and only once these factors are established according to the Malaysian Domestic Law can the DTA be resorted to in order to determine whether relief is available. Relief in this case is clearly afforded by Article IV so long as the said income is regarded as business income under s. 4(a). DTA cannot be utilised to change the character of the said income from business income to that of royalties, or to be treated as that of a charging or taxing statute. It is to be treated as an agreement for relief against taxation.

[Appeal allowed with costs.]

Case referred to:
American Leaf Blending Co. Sdn. Bhd. v. Director-General of Inland Revenue [1979] 1 MLJ 1

Legislation referred to:
Income Tax Act 1967, s. 4, (a), (d)

For the applicant - K.H. Koh; M/s. K.H. Koh, Cheong & Kok
For the respondent - Zaleha Zahari; SFC, Inland Revenue

JUDGMENT

LC Vohrah J:

The appellant was incorporated in Singapore and is resident in Singapore with no permanent establishment in Malaysia. It carries on in Singapore the business of hiring cranes and trucks for profit. For the two years ending 30 June 1976 and 1977 it received income from the letting of cranes on hire to Walter Wright (M) Sdn. Bhd. for use in Malaysia ("the said income") in the following amounts:

Y/E 30 June	Trade Receipt
1976	RM 36,800
1977	RM595,560
	RM632,360

The appellant was assessed to income tax by the Singapore Government in respect of the said income on the basis that it was business income pursuant to the Singapore Income Tax Act, Chapter 141. The respondent on its part raised the assessments in respect of the said income as follows:

Y/A	Date of N/A	CI	Tax
1976	4 December 1985	RM 18,400	RM 3,680
1977	4 December 1985	RM316,180	RM63,236
1978	4 December 1985	RM297,780	RM59,556
		RM632,360	

These assessments were raised by the respondent having regard to s. 4(d) of the Income Tax Act 1967 ("the ITA") and Article VIII of the agreement between the Government of Malaysia and the Government of the Republic of Singapore for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income ("the DTA") scheduled to the Double Taxation Relief (Singapore) O. 1968 ("the Relief Order). The Special Commissioners of Income Tax confirmed the assessments raised by the respondent. Hence this appeal.

The question for determination is whether relief is available to the appellant having regard to s. 4(a) of the ITA and Article IV of the DTA.

It would be convenient at this point to reproduce the main provisions which have been referred to s. 4 of the ITA reads:

> 4. Subject to this Act, the income upon which tax is chargeable under this Act is income in respect of:
>
> (a) **gains or profits from a business, for whatever period of time carried on**;
>
> (b) gains or profits from an employment;
>
> (c) dividends, interest or discounts;

(d) **rents, royalties or premiums**;

(e) pensions, annuities or other periodical payments not falling under any of the foregoing paragraphs;

(f) gains or profits not falling under any of the foregoing paragraphs.
(Emphasis added).

Articles IV and VIII of the DTA read as follows:

Article IV

1. (a) The income or profits of a Singapore enterprise **shall not** be taxable in Malaysia **unless the enterprise carries on business in Malaysia through a permanent establishment situated in Malaysia**. If the enterprise carries on business as aforesaid, tax may be imposed in Malaysia on the income or profits of the enterprise but only on so much thereof as is derived by that permanent establishment in Malaysia.

   (b) The income or profits of a Malaysian enterprise shall not be taxable in Singapore unless the enterprise carries on business in Singapore through a permanent establishment situated in Singapore. If the enterprise carries on business as aforesaid, tax may be imposed in Singapore on the income or profits of the enterprise but only so much thereof as is attributable to that permanent establishment in Singapore.

2. Where an enterprise of one of the Contracting States carries on business in the other Contracting State through a permanent establishment situated therein, there shall in each Contracting State be attributed to that permanent establishment the profits which it might be expected to make if it were a distinct and separate enterprise engaged in the same or similar activities under the same or similar conditions and dealing independently with the enterprise of which it is a permanent establishment.

3. In determining the income or profits of a permanent establishment, there shall be allowed as deductions all expenses including executive and general administrative expenses, which would be deductible if the permanent establishment were an independent enterprise in so far as they are reasonably allocable to the permanent establishment, whether incurred in the Contracting State in which the permanent establishment is situated or elsewhere.

4. No income or profits shall be derived by or attributed to a permanent establishment by reason of the mere purchase and transportation by that permanent establishment of goods or merchandise for the enterprise.
(Emphasis added).

Article VIII

1. Royalties derived from sources within one of the Contracting States by a resident of the other Contracting State **may be taxed** in the Contracting State from which the royalties are derived.

2. **The term "royalties" as used in this Article means payments of any kind received as consideration** for the use of, or the right to use, any copyright, patent, trademark, design or model, plan, secret formula or process or **for the use of**, or the right to use **industrial, commercial or scientific equipment**, or for information concerning industrial, commercial or scientific experience, but does not include any royalty or other amount paid in respect of literary or artistic copyrights or of motion picture films or of tapes for television or broadcasting or of the operations of a mine, oil well, quarry or other place of extraction of natural resources or of timber or of forest produce.

3. Sums derived by a resident of one of the Contracting States from sources within the other Contracting State from the alienation of any right or property from which royalties as defined in para. 2 of this Article, are or may be derived, may be taxed in the Contracting State from which the sums are derived.

4. *The provisions of paras. 1 and 3 of this Article shall not apply if the recipient of the royalties or sums, being a resident of one of the Contracting States has in the other Contracting State from which the royalties or sums are derived, a permanent establishment with which the right or property giving rise to the royalties or sums is effectively connected. In such event, the provisions of Article IV shall apply*.

5. Where, owing to a special relationship between the payer and the recipient or between both of them and some other person, the amount of royalties or sums paid, having regard to the use, right, property or information for which they are paid, exceeds the amount which would have been agreed upon by the payer and the recipient in the absence of such relationship, the provisions of this Article shall apply only to the last-mentioned amount. In that case, the excess part of the payments shall remain taxable according to the laws of each Contracting State, due regard being had to the other provisions of this agreement.

6. Royalties as defined in para. 2 of this article shall be treated as derived from sources within the Contracting State in which the property from which such royalties are derived is used.

7. Sums derived from the alienation of any right or property referred to in para. 3 of this Article shall be treated as derived from sources within the Contracting State in which such right or property is used.
(Emphasis added)

In the Privy Council case of *American Leaf Blending Co. Sdn. Bhd. v. Director-General of Inland Revenue* [1979] 1 MLJ 1, it was held that rents despite the fact that they were referred to in s. 4(d) of the ITA "might nevertheless constitute income from a source consisting of a business if they were receivable in the course of carrying on a business of putting the taxpayer's property to profitable use by letting it out for rent" because "there is plainly room for overlapping between one paragraph and another" having regard to the ordinary meaning of the words in the various paragraphs of s. 4. On this authority it is clear that **rental** income, despite the fact it is referred to specifically in s. 4(d), may nevertheless constitute income from a source consisting of a business if it is receivable in the course of carrying on a business of putting the taxpayer's property to profitable use by letting it out for rent. In this connection it is pertinent to note that the Special Commissioners found that:

> the business of the company consisted of hiring out cranes and trucks in Malaysia and as the accounts show - and the Revenue does not dispute this - it was not an inconsequential side show but its lifeblood. So there is no doubt that under Malaysian domestic law, i.e., the ITA, the rental income of the taxpayer is business income and not only rental income.

There is no question in this appeal that the appellant was carrying on the business of letting out its cranes and trucks for hire and having regard to the overlapping principle propounded by the above authority the said income should under the ITA be characterized as "gains or profits from a business" chargeable to tax under s. 4(a). So the question I now have to address is whether the express provisions of para. 2 of Article VIII of the DTA can be called in aid by the respondent to displace this characterization according to the overlapping principle in order to bring into charge for Malaysian tax the said income on the ground that it is royalty although on the basis of the overlapping principle it is business income which is clearly not chargeable to tax by reason of para. 1(a) of Article IV.

The ITA is a taxing statute, an Act of Parliament for the imposition of income tax. The DTA brought into effect by the Double Taxation Relief (Singapore) Order 1968 is an agreement for the avoidance of double taxation and prevention of fiscal evasion in respect of taxes on income. There is no question in this case of fiscal evasion. I agree with Counsel for the appellant that the nature of the income has to be determined by the ITA and the law which charges it to tax also has to be the ITA and that only once these factors are established according to the Malaysian domestic law, can the DTA be resorted to in order to determine whether relief is available. Relief in this case is then clearly afforded by Article IV so long as the said income is regarded as business income under s. 4(a). I therefore find myself unable to accept the contention of Counsel for the respondent that the said income is chargeable to tax in Malaysia by reason of Article VIII on the ground that it constitutes "royalties" within the definition contained in para. 2 of that Article, in other words that the provisions of para. 1 of that Article that "royalties" may be taxed in the Contracting State from which they are derived render the said income chargeable to Malaysian income tax. To do so would be not only to utilise the DTA to change the character of the said income from business income to that of royalties but also to treat the character of the DTA as that of a charging or taxing statute instead of an agreement for relief against taxation. In any event, I also agree with Counsel for the appellant, as conceded by Counsel for the respondent, that para. 1 of Article VIII is merely permissive in its terms; it envisages a situation in which "royalties" within its definition, may not be subject to relief but does not, and, in my judgment, cannot, by implication, impose a tax on income which is specifically afforded relief by Article IV. Accordingly, I am of the opinion that the Special Commissioners were wrong in confirming the assessments raised by the respondent in this case. The appeal is allowed with costs.

Also found at [1990] 2 CLJ 137